Public Prosecutor v Azizul bin Abdul Aziz

HIGH COURT (KANGAR) — CRIMINAL TRIAL NO 45–05 OF 2006
ZAMANI A RAHIM JC
10 DECEMBER 2009

Criminal Law — Murder — Causation — Whether death of deceased caused by accused — Whether there was evidence to connect accused with injuries suffered by deceased — Whether cause of death accidental drowning

Criminal Procedure — Prosecution — Prima facie case — Close of prosecution's case — Positive evaluation of credibility and reliability of all evidence — Whether elements of offence established — Whether evidence sufficient to convict accused if he elected to remain silent — Whether any reasonable doubt existed in prosecution's case

Criminal Procedure — Trial — Prosecution's case — Murder — Whether chain of causation linking death of deceased to injuries sustained established

The accused was charged with an offence of murder for the killing of one Noorhidayu, an offence punishable under s 302 of the Penal Code ('Code'). The solitary so-called witness that could incriminate the accused was SP13. In the course of the proceedings the prosecution applied to declare him hostile. Further, according to the forensic pathologist ('SP3'), the cause of death could in all probability be accidental drowning as there were no trauma marks whatsoever on the body.

Held, acquitting and discharging the accused without calling for defence:

(1) At the close of the case for the prosecution, the court must undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no prima facie case (see paras 5–6).

(2) One of the essential ingredients to sustain an offence under s 302 of the Code is that the death must have been caused by the act of the accused. There was not an iota of evidence to connect the accused with any of the injuries on the deceased. The cause of death could in all probability be accidental drowning. There was also no circumstantial evidence tendered by the prosecution in this aspect of the case to indicate shadows of guilt on the accused (see paras 6, 8–9 & 12).

(3) SP13 gave two statements to the police during investigations. The earlier investigative statement tallied with his sworn testimony in court which completely exonerated the accused of any culpability whatsoever of any crime. As for the latter statement, he testified that he was pressured to give the statement. At the material time of death, the accused was with SP13, a fact which totally demolished the prosecution's case as to any notion of the accused's participation in the crime (see paras 19 & 21).

[Bahasa Malaysia summary

Tertuduh dituduh dengan satu kesalahan membunuh Noorhidayu, satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun'). Satu-satunya saksi yang boleh membabitkan tertuduh adalah SP13. Dalam perjalanan prosiding pihak pendakwaan memohon untuk mengisytiharkannya sebagai saksi belot. Selanjutnya, menurut pakar patologi forensik ('SP3'), punca kematian kemungkinan besar akibat mati lemas secara tak sengaja kerana tidak terdapat tanda-tanda trauma di bahagian badan si mati.

Diputuskan, membebaskan dan melepaskan tertuduh tanpa memanggil pembelaan:

(1) Di akhir kes pendakwaan, mahkamah mesti menjalankan penilaian kredibiliti yang positif dan kebolehpercayaan semua keterangan yang dikemukakan bagi menentukan sama ada elemen-elemen kesalahan telah dibuktikan. Ujian di akhir kes pendakwaan adalah: Adakah keterangan-keterangan mencukupi untuk mensabitkan tertuduh jika dia memilih untuk kekal berdiam diri? Jika jawapan adalah afirmatif maka satu kes prima facie telah dibuktikan. Ini semestinya, sebagai keperluan, memerlukan satu pertimbangan mengenai kewujudan apa-apa keraguan yang munasabah dalam kes pendakwaan. Jika terdapat apa-apa keraguan sedemikian maka tiada kes prima facie (lihat perenggan 5–6).

(2) Salah satu daripada elemen penting bagi mempertahankan satu kesalahan di bawah s 302 Kanun adalah kematian mesti disebabkan

oleh perbuatan tertuduh. Tidak terdapat sebarang bukti untuk menghubungkan tertuduh dengan mana-mana kecederaan pada si mati. Punca kematian kemungkinan besar adalah mati lemas secara tak sengaja. Di sini juga tiada keterangan mengikut keadaan yang dikemukakan oleh pendakwaan dalam aspek kes ini untuk menunjukkan tanda-tanda kebersalahan ke atas tertuduh (lihat perenggan 6, 8–9 & 12).

(3) SP13 memberi dua kenyataan kepada polis semasa penyiasatan. Kenyataan siasatan terdahulu adalah sama dengan keterangan bersumpah di mahkamah yang sepenuhnya melepaskan tertuduh daripada mana-mana kesalahan bagi sebarang jenayah. Bagi kenyataannya yang terkemudian, dia memberikan keterangan bahawa dia dipaksa untuk memberi kenyataan tersebut. Pada waktu material kematian, tertuduh ada bersama SP13, satu hakikat yang sama sekali mematahkan seluruh kes pendakwaan terhadap apa-apa tanggapan berkenaan penglibatan tertuduh dalam jenayah tersebut (lihat perenggan 19 & 21).]

Notes

For a case on causation, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1155.

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2945–2957.

For cases on prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4939–4952.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Khoo Cheng Huat v PP [1991] 1 MLJ 42, HC (refd)

Krishnan & Anor v PP [1981] 2 MLJ 121, FC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)

PA Anselam v PP [1941] MLJ 157, HC (folld)

Pavone v PP [1986] 1 MLJ 72, HC (refd)

PP v Harif Basree Abdul Rahman [2004] 3 CLJ 700, HC (refd)

PP v Hanif Basree bin Abdul Rahman [2007] 2 MLJ 320; [2007] 2 CLJ 33, CA (refd)

PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161; [2008] 4 CLJ 1, FC (refd)

PP v Tan Chye Joo & Anor [1989] 2 MLJ 253, HC (folld)

Legislation referred to

Criminal Procedure Code s 180, 180(1), (2), (3)
Evidence Act 1950 ss 145(1), 154, 155(c)
Penal Code s 302

Norhayati Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Ranjit Singh Dhillon (J Kaur, Ranjit & Associates) for the accused.

Zamani A Rahim JC:

THE CHARGE

[1] The accused was charged with an offence of murder under s 302 of the Penal Code. The charge reads as follows:

> Bahawa kamu pada 11 Februari 2006 antara jam lebih kurang 10.00 malam sehingga 12 Februari 2006 jam lebih kurang 8.30 pagi di Terusan Paya Jalan Alor Sena, Beseri, dalam Daerah Kangar, di dalam Negeri Perlis telah membunuh Noorhidayu binti Meli No KP:870321-40-5068, dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

PRIMA FACIE CASE

[2] At the close of the prosecution case, we are subjected to a prima facie phrase requiring a maximum evaluation of the prosecution evidence presented before the trial court. As regard the phraseology prima facie case, s 180 of the Criminal Procedure Code provides as follows:

(1) When the case for the prosecution in concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the court finds that a prima facie case has not been made out against the accused, the court shall record an order of acquittal.

(3) If the court finds that a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

[3] Thus whether the accused is acquitted or called to enter his defence depend upon whether the prosecution has made out a prima facie case against the accused on the offence charged. What is a prima facie case? In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 the Federal Court has dealt with the phrase 'prima facie case' as follows at p 315 (MLJ); p 99 (CLJ):

A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whitley's Law Dictionary* (11th Ed) as:

> A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[4] And continuing at p 316 (MLJ); p 100 (CLJ):

> The test at the close of the case for the prosecution would therefore be. Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no prima facie case.

[5] The steps to be observed by the trial court at the close of the prosecution case are summarised as follows:

In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 the Federal Court has this to say at p 399 (MLJ); p 465 (CLJ):

> After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate court and the High Court under the amended section is to call for the defence when it is satisfied that a prima facie case has been made out at the close of the prosecution's case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter on his or her defence. It involves an assessment of the credibility of the witness called by the prosecution and the drawing of inferences admitted by the prosecution's evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See *Tai Chai Keh v Public Prosecutor* [1948–49] MLJ Supp 105; *Public Prosecutor v Kassim bin Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution's case, comes to the conclusion that a prima facie case has not been

made out, it should acquit the accused. If, on the other had, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a prima facie case has been made out, it must call for the defence. If the accused elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the prima facie case, one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question. If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

INGREDIENTS OF THE OFFENCE

[6] At the end of the case for the prosecution, let us now proceed to assess and evaluate the evidence in relation to the essential ingredients to sustain an offence under s 302 of the Penal Code. The main ingredients being as follows:

(a) Noorhidayu bt Meli had died between 10pm on 11 February 2006 and 8.30am on 12 February 2006;

(b) Her death was caused by the act of the accused; and

(c) Such act was done with the intention of causing death or with the intention of causing such bodily injuries as (a) the appellant knew to be likely to cause her death, or (b) was or were sufficient in the ordinary cause of nature to cause death.

[7] As to ingredient (a) above, there was ample evidence to show that Noorhidayu had died between the stipulated time mentioned in the charge (deceased). Throughout the proceedings, this fact has not been disputed by the defence.

[8] The next issue is whether the death of Noorhidayu was caused by the accused. In other words, were the injuries sustained by the deceased were inflicted by the accused. It is in this integral part that the prosecution's case is found to be severely wanting. There is not an iota of evidence to connect the accused with any of the injuries on the deceased.

[9] As a matter of fact, according to the forensic pathologist, Dr Mohd Suhani bin Mohd Nor, SP3, the cause of death could in all probability be *accidental drowning* as there were no trauma marks whatsoever on the body.

The absence of these marks ruled out any force being inflicted on the body, nor was anything suspicious circumstances found on the body to indicate homicide at all. The evidence of SP3 in examination-in-chief on his postmortem examination of the deceased is reproduced below in extenso.

Pemeriksaan Luaran

Daripada pemeriksaan luaran, saya mendapati mayat si mati berada dalam keadaan yang agak elok di mana tiada perubahan akibat proses pereputan yang melampau. Saya mendapati jari-jari tangan dan kuku si mati berkenaan kecut dan berkedut. Saya juga mendapati terdapat dua parut lama iaitu satu di bahagian bawah kanan abdomen dan satu lagi pada bahagian atas sebelah hadapan peha kanan.

Saya mendapati kecederaan-kecederaan luaran seperti berikut:

(1) Kesan melecet yang berukuran 1 x 0.5 cm pada pipi kiri.

(2) Kesan melecet yang berukuran 0.7 x 0.2 cm pada bibir bawah.

(3) Kesan melecet yang berukuran 0.3 x 0.3 cm pada sebelah tepi kiri mulut.

(4) Kesan lebam yang berukuran 1.5 x 1.5 cm pada bahagian belakang lengan bawah kiri.

(5) Luka koyak yang berukuran 0.5 x 0.1 cm pada tisu di bahagian belakang pinggir lubang vagina, walau bagaimanapun selaput dara kelihatan normal

Pada pendapat saya kecederaan no (1) adalah disebabkan oleh 'blunt force'.

Kecederaan no (2), no (3), no (4) dan no (5) adalah disebabkan seperti kecederaan no (1) iaitu 'blunt force'. 'Blunt force' ini boleh disebabkan objek tumpul.

Secara umum kecederaan pada bahagian muka si mati disebabkan (i) kecederaan di pipi disebabkan terjatuh, terkena pukulan, begitu juga kecederaan di bibir dan di tepi mulut. Pada kebiasaannya corak kecederaan yang dilakukan oleh diri sendiri tidak ada melibat bahagian muka. Sekiranya ia berlaku, ia juga tidak ada melibatkan bahagian mulut.

Kecederaan no (5), secara umum boleh dilakukan oleh si mati sendiri seperti mengangkang kaki yang luas atau terkena objek tumpul di bahagian tersebut.

Pemeriksaan Dalaman

Pemeriksaan dalaman bahagian kepala tidak menunjukkan terdapat pendarahan pada kulit kepala, tiada keretakan tengkorak, tiada pendarahan pada selaput-selaput otak dan tiada kecederaan pada organ otak.

Saya juga tidak menjumpai kesan penyakit biasa pada organ otak.

Saya mendapati terdapat pendarahan di penghujung lidah, organ-organ leher tidak menunjukkan tanda-tanda kecederaan. Pemeriksaan dalam bahagian dada menunjukkan terdapatnya 'edema' pada paru-paru kanan. Lain-lain organ dada termasuk tulang sangkar data tidak menunjukkan kesan kecederaan.

Pemeriksaan dalaman bahagian 'abdomen' menunjukkan organ appendix sudah tiada, selain itu tiada kesan kecederaan pada organ-organ dalaman abdomen si mati.

Bladder atau pundi kencing mengandungi sedikit air kencing dan uterus menunjukkan bahawa ianya bersaiz normal dan tiada bukti kesan kandungan. Disamping itu terdapat darah dalam uterus yang berpadanan dengan si mati sedang datang haid.

Pemeriksaan tulang pelvis dan tulang belakang tidak menunjukkan kesan patah.

Setelah saya menerima lapuran 'toxicology' yang bersifat negative dan setelah mengambil kira penemuan dalaman dan luaran, sebab kematian si mati adalah *mati lemas (drowning)*.

[10] In cross-examination, SP3 said:

Saya setuju 'drowning' di bahagikan kepada 3 iaitu 1) homicidal, 2) suicidal dan 3) accidental.

Mengikut penemuan saya dalam postmortem kes ini, mungkin *kematian lemas ini adalah 'accidental'*.

[11] In re-examination, SP3 clarified as follows:

kematian lemas dalam kes ini kemungkinan accidental adalah merujuk kepada 'possibility' kerana dalam kes-kes mati lemas, tiada kecederaan yang teruk yang kelihatan pada tubuh badan simati, tiada tanda-tanda kecederaan yang 'self-inflicted' eg bunuh diri, maka ada kemungkinan mati lemas tersebut adalah 'accidental', walau bagaimanapun 'manner of death' dalam mati lemas tidak boleh bergantung kepada postmortem sahaja. Ianya mesti mengambil lain-Iain bukti yang ditemui di dalam siasatan polis kerana postmortem adalah untuk membantu dalam siasatan mereka.

[12] There was also no circumstantial evidence tendered by the prosecution in this aspect of the case to indicate shadows of guilt on the accused. The test for circumstantial evidence is best described by the Court of Appeal in the case of *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320; [2007] 2 CLJ 33. His Lordship, Mohd Ghazali Yusoff JCA (as he then was) aptly described it as p 346 (MLJ); p 68 (CLJ) as follows:

Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strands of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chun Chwen Kong v Public Prosecutor* [1962] MLJ 307). There is insufficient evidence to connect the respondent with the killing. Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person you will find your judgment

is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see *Idris v Public Prosecutor* [1960] MLJ 96).

HOSTILE WITNESS, SP13 — IS HE CREDITWORTHY?

[13] The solitary so-called witness that could incriminate the accused was SP13. In the course of the proceedings the prosecution applied to declare him hostile. This drastic move by itself spelt the end of the prosecution's case. The effect of a party to the proceedings declaring it's own witness hostile can best be seen at p 2426, of the celebrated text, *Sarkar's Law of Evidence* (16th Ed 2007) which reads as follows:

> Effect of Cross-Examining a Party's Own Witness — It was held in *Surendra v Raneee Dassi* 47 C 1043; 24 CWN 860 (relying on *Faulkner v Brine* 1858 1 F & F 254), where however, the earlier case of *Bradley v Ricardo* (1831) 8 Bing 57 was not cited that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. This view was affirmed in a series of decisions (see *R v Satyendra* 37 CLJ 173; 71 IC 657; *Khijiruddin v R* 53 C 372; A 1926 C 139; 27 Cri LJ 266 (approved in *Jagir v SA* 1975 SC 1400); *Maqbul v R* 32 CWN 872; 56 C 145; *Bikram v R* 50 CLJ 467; *Panchanan v R* 57 C 1266; 34 CWN 526) and it was held that omission to tell the jury to reject the evidence altogether amounted to a misdirection. The above doctrine was based on the view that the object of cross-examination of a party's own witness was to discredit the witness and amounted to an admission that he was not a witness of truth. But the only object of cross-examination is not to impeach the credit of a witness but also to compel him to make admissions favourable to the cross-examiner and to find out the truth, although in certain circumstances it may have the effect of discrediting the witness altogether. In *Bradley v Ricardo*, Tindal CJ, said: it has been urged as an objection that this would be giving credit to the witness on one point after he had been discredited on another; but difficulties of the same kind occur in every cause where a jury has to decide on conflicting testimony. *Bradley v Ricardo* was not cited in any of the above cited cases. See further, *Summer Leivesley v Brown & Co* (1909) 25 TLR 745.

[14] Closer to home is the case of *PA Anselam v Public Prosecutor* [1941] MLJ 157. In that case a witness was treated as hostile with the leave of the court and was cross-examined on a previous unsworn statement. In commenting on the value of the witness's evidence, Home J (as he then was) said at p 157 as follows:

> ... such cross-examination is not for the purpose of substituting the unsworn statement for his testimony given in open court on affirmation. All that such a cross-examination can do is to prevent the court giving any value to his sworn statement that the women always paid the rent. The magistrate was clearly wrong

in placing any reliance upon this witness. His evidence should have been treated as negligible and the verdict found on the rest of the evidence; *R v Harris* (1927) Cr App R 144.

[15] The effect of a previous unsworn out of court statement can never be a substitute for sworn testimony can be seen in a number of cases. The Federal Court, speaking through Salleh Abas FJ (as he then was) in the case of *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121 at p 124 had this to say:

... It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness with his former statement. In other words the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

[16] It was once again pointed out by Edgar Joseph Jr (as he then was) in *Pavone v Public Prosecutor* [1986] 1 MLJ 72, that the record of proceedings of the original trial, under the circumstances, can only be used for the purposes of cross-examining a witness under ss 145(1) and 155(c) of the Evidence Act and they can on no account constitute substantive evidence at the trial. Reference is made to p 74 of the report which states as follows.

... With respect, the competence of ASP Fariddudin to speak as to the nature of the offending exhibit although obviously relevant to the question whether his evidence or that of the chemist should be preferred by the court, has no relevance whatsoever to the application for impeachment. It must be recognised that the record of proceedings at the original trial can only be used for the purpose of cross-examining ASP Fariddudin under the provisions of ss 145(1) and 155(c) of the Act. It can on no count constitute substantive evidence at the retrial. By analogy, I would refer to the Privy Council cases of *Brijil Bhushan Singh v R* and *Mamand v Emperor*, which are authorities for the proposition that a statement made under s 164 of the Indian Criminal Procedure Code (equivalent to the old s 113 of our Code) used for purposes for impeaching the credit of witness cannot be used as substantive evidence. Such a statement can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false but that does not establish that what he stated out of court under the section is true.

[17] Even in ordinary circumstances, quite apart from proceedings under s 154 of the Evidence Act, the evidence of this sort of shifting witness can only have trifling weight or rather, no weight can be attached to his testimony. In dealing with the testimony of this sort of witness, Edgar Joseph Jr (as he then was) in the case of *Khoo Cheng Huat v Public Prosecutor* [1991] 1 MLJ 42 had this to say at p 45:

A As Spenser-Wilkinson J said when speaking for our then Court of Appeal, in *Goh Ah Yew v Public Prosecutor*.

A witness cannot be regarded as a split personality who is regarded as worthy of credit at one moment and untrustworthy at another.

B In omitting therefore, to direct herself as aforesaid, and in consequence, in omitting to reject the testimony of the complainant and his wife in its entirety, the learned president had misdirected herself seriously, on the facts, and on this ground alone the conviction cannot stand.

C **[18]** Recently, the Federal Court had occasion to comment on the testimony of suspect witnesses in case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631. His Lordship Gopal Sri Ram FCJ had this to say at p 317 (MLJ); p 647 (CLJ) as follows:

D ... The fact remains that PW8 had made a previous statement to PW3 which was inconsistent with his evidence in court. This, at the very least, had the effect of rendering his evidence suspect. It most certainly required the trier of fact to approach that evidence with caution. As Ali J (later Ag LP) said in *Mohamed bin Kasdi v Public Prosecutor* [1968] 1 LNS 78.

E No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.

F **[19]** However, the contrary view could also hold true as SP13 gave an explanation to his two differing versions. He gave two statements to the police during investigations. The earlier investigative statement tallies with his sworn testimony in court which completely exonerates the accused of any culpability whatsoever of any crime. As for the latter statement, he testified G that he was pressured to give the statement. The earlier statement being earlier in time of the incident was dated 12th February 2006 and the later statement was dated 20th February 2006. Shortly after the second statement, he was released from custody. In support of his explanation, he lodged a police report D47 against the police and the learned deputy public prosecutor H conducting the case. In all fairness to the prosecution, the learned deputy public prosecutor subsequently applied to recuse himself from taking any further part in the proceedings which was promptly granted by the court. If his explanation is probable, then his credit is saved to the benefit of the accused and the detriment of the prosecution. Such a situation occurred in I the case of *Public Prosecutor v Tan Chye Joo & Anor* [1989] 2 MLJ 253. His Lordship Wan Adnan J (as he then was) said at p 255:

PW10 was a prosecution witness. After he had given his evidence the learned deputy public prosecutor applied to the court for permission to cross-examine him under s 154 of the Evidence Act on the ground that his evidence differed from his

earlier statement to the police. I read the witness's statement to the police and found there were discrepancies. I permitted the prosecution to cross-examine the witness.

The object of the cross-examination under s 154 of the Evidence Act is only to test the veracity of the witness. The grant of the permission to cross-examine is not an adjudication by the court adverse to the veracity of the witness. Whether the testimony of the witness should be rejected in whole or in part depends on the result of the cross-examination.

The witness did not deny the statement he made to the police. He maintained that his evidence in court was the truth. He explained that he said he never entered the room upstairs because he was frightened as something had been recovered there. I found his explanation to be reasonable. I therefore did not wholly reject his evidence.

[20] The relevant part of SP13's testimony that totally exonerates the accused is as follows:

Pada 11.2.2006, jam 8.30 malam, saya berada di kedai runcit, Jun (accused) datang berjumpa saya disimpang tiga di tepi kedai runcit. Saya dan Jun hendak keluar pergi ke Bandar Kangar. Saya dan Jun pergi ke Bandar Kangar dengan motorsikal Jun dengan mengikut Jalan Ulu Pauh. Kami keluar ikut Jalan Tambun Tulang terus ke Simpang Empat. Kami berhenti dekat Bank Pertanian, Simpang Empat di bawah sebatang pokok.

Di bawah pokok itu terdapat 2 biji kereta Wira. Saya juga lihat seorang perempuan keluar dari salah sebuah kereta Wira itu dan dia berjalan menuju ketempat saya dan Jun. Perempuan itu telah bersembang dengan Jun. Perempuan yang keluar dari kereta dan bersembang dengan Jun ialah Ayu (deceased).

Saya pula pergi jauh sedikit meninggalkan Jun dan Ayu. Mereka bersembang lebih kurang 10 minit. Saya lihat Ayu ada beri talipon bimbit kepada Jun. Jun telah mengambil talipon bimbit itu dan saya lihat Jun memberi duit kepada Ayu. Saya tidak tahu berapa jumlah duit yang diberi oleh Jun kepada Ayu.

Selepas itu, saya lihat Ayu pergi balik ke kereta Wira tadi. Saya pun pergi semula kepada Jun. Jun beritahu saya Ayu telah gadaikan handphonenya kepadanya dengan harga RM500.00. Selepas itu saya dan Jun menaiki motorsikal pergi ke Kangar. Jun menunggang motorsikal dan saya duduk membonceng.

Dalam perjalanan di atas motorsikal, Jun beritahu saya, Ayu hendak berjumpa dengan dia lagi di Seven Eleven dekat 'roundabout', Taman Sena. Apabila tiba di Kangar, saya dan Jun pergi menunggu di public phone berhampiran Seven Eleven tersebut.

Saya dan Jun tunggu di situ sehingga jam lebih kurang 11.30 malam, Ayu tidak datang. Saya dan Jun pun pulang ke Felda Chuping.

Pada 12.2.06, jam lebih kurang 11.00 pagi, Jun telah berjumpa saya di kedai runcit Felda Chuping dan dia beritahu sepupu Ayu hendak berjumpa dia. Jun ajak saya ikut sama. Saya pun ikut Jun dengan menaiki motorsikal Jun. Saya duduk sebagai pembonceng.

> Saya dan Jun pergi ke dewan dekat Tadika Kemas, Felda Chuping. Apabila sampai di dewan itu, saya lihat sebuah kereta Kancil berwarna putih.

[21] Thus at the material time of death, the accused was with SP13, a fact which totally demolished the prosecution's case as to any notion of the accused's participation in the crime as charged.

CONCLUSION

[22] In conclusion, there is a serious lack of evidence led by the prosecution to prove the essential element of causing death of the deceased that was attributable to the accused. In the result, no prima facie case has been made out against the accused as charged. Thus, there is no need for this court to hear any rebuttal evidence from the accused as no prima facie case has been proven from the evidence adduced. In *Public Presecutor v Hanif Basree Abdul Rahman* [2004] 3 CLJ 700 (*Hanif Basree bin Abdul Rahman*'s case), the trial judge Abdull Hamid Embong J (as he then was) said as follows:

> In this case, not only did this court find the evidence lacking to point towards the accused as having committed this murder but that the prosecution's case itself is tainted with doubt, gaps and inferences favourable to the accused. It would be against the evidence, now considered in totality, and having considered its cumulative effect, for this court to call upon the accused to enter his defence. In short, there is in this case, no need for me to hear rebuttal evidence from the accused. I am reminded here by the words of Sharma J in *Public Prosecutor v Saiman & Ors* [1971] 2 MLJ 16 who said:
>
> ... the court is not entitled merely for the sake of joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.

[23] The sound decision of Abdull Hamid Embong J (as he then was) in *Hanif Basree bin Abdul Rahman*'s case, has withstand a close judicial scrutiny of the two appellate courts — the Court of Appeal [2007] 2 MLJ 320; [2007] 2 CLJ 33 and the Federal Court [2008] 3 MLJ 161; [2008] 4 CLJ 1. The 5-member corum of the Federal Court led by Zaki Tun Azmi PCA (as he then was) affirmed the decision of the learned trial judge and that of the Court of Appeal. His Lordship concluded his judgment at p 174 (MLJ); p 19 (CLJ), inter alia:

> I have read through the judgments of the learned trial judge and the Court of Appeal and find that the trial judge had correctly examined the evidence adduced before him and had also correctly applied the principles when assessing circumstantial evidence, particularly as in this case, when there is a reasonable likelihood of the existence of another person who could have committed the

offence (see *R v Abbot* [1955] 2 All ER 899 and *Public Prosecutor v Muhamad Nasir Sharuddin & Anor* [1994] 2 MLJ 576; [1992] 1 LNS 8).

[24] His Lordship went on to say:

> The learned trial judge was right in deciding not to call for the defence at the close of the prosecution and acquitting and discharging the accused at that stage. I dismiss this appeal and affirm the decision of the learned trial judge and that of the Court of Appeal.

[25] The accused is hereby acquitted and discharged without calling for his defence.

Accused acquitted and discharged without defence being called.

Reported by Kanesh Sundrum